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The Action of Indebitatus (General) Assumpsit - at Common Law, under Modern Codes, Practice Act and Rules of Court (Continued)

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THE ACTION OF INDEBITATUS (GENERAL) ASSUMPSIT—AT COMMON LAW, UNDER MODERN CODES, PRACTICE ACTS AND RULES OF COURT (Continued)

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(VI) *The Common Counts.* — The concessions made to the innkeeper, the carrier, the tailor and others having a common calling, in making the *quantum meruit* and *quantum valebant* count available as a remedy, were granted because the Law had imposed upon them the duty to perform certain services for those who applied to them, and hence it was only just and logical that a corresponding duty should be imposed upon those benefited. Such holdings opened up the way for an extension of the same doctrine to all persons who performed similar services, whether they carried on one of the so-called common callings or not. The right of action, or the innovation thus approved, according to Street,[67] "was *in consimili casu* with Debt," or a special action on the case in the nature of Debt. As a result of this development, that is, of the practice of creating a promise on the particular facts of such a case, the common counts gradually came into use. And in these cases, as in the *quantum counts*, the plaintiff, after setting forth the facts, merely alleged that the defendant, being indebted, promised to pay. But these allegations, while in form resembling a species of Indebitatus Assumpsit, are to be differentiated from Indebitatus Assumpsit in its original sense, which lay for a simple executed debt, whereas in this latter form it was available without proof of a common-law debt. In the *quantum counts* there were present factors of consideration and agreement — factors not present in the common counts, hence the promise present in the *quantum counts* now had to be supplied by implication, which means, they had to be imposed by operation of law.

(A) *Procedural Advantages to Plaintiff Afforded by the Simplicity of Pleading in Indebitatus Assumpsit.* — The common counts, as thus invented and developed, were to prove of inestimable value to the pleader. Aside from permitting an escape from wager of law and securing a right to trial by jury, the new form of remedy afforded a plaintiff certain procedural advantages which,

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67. 3 Street, Foundations of Legal Liability, c. XV, *The Action of Indebitatus Assumpsit*, 188 (Northport 1906).

in time was bound to promote its popularity, as well as temporarily to lead to the obsolescence of Debt. In declaring in Debt, with the possible exception of declaring upon an account stated, the plaintiff, as we have seen, was required to allege the debt with extreme particularity, that is, he had to describe the goods sold, specify the quantity and quality, together with a statement of a sum certain due; whereas, in declaring in Indebitatus Assumpsit, the debt being laid as an inducement to the *assumpsit,* it was sufficent merely to make a general allegation of the indebtedness, as for money lent, money paid, or goods sold at the defendant's request, money had and received to the plaintiff's use, work and labor at the defendant's request, or upon an account stated, and, in each case, accompanied by an allegation that the defendant being so indebted, promised to pay.[68] As stated in *Gardiner v. Bellingham,*[69] (1613), pleading the *assumpsit* "requires not so much certainty as if it were an action of Debt upon the very contract."

(B) *Indebitatus Assumpsit as a Remedy for Customary Duties and Legal Penalties.* — In *York v. Town*[70] Lord Holt expressed strong opposition to the extension of Indebitatus Assumpsit as a remedy for customary duties and legal penalties. His view was that it was not proper that issues concerning customary duties and fines incurred under by-laws or charters should be left within the province of juries, which he regarded as inevitable, if Indebitatus Assumpsit was adopted as a remedy in this field, for, as pointed out above, trial by jury was one of the procedural advantages which made the action popular with both lawyers and litigants. Notwithstanding, as Street observes, the fact that it was "curious

68. See Ames, Lectures on Legal History, c. XIV, *Implied Assumpsit,* 149, 153 (Cambridge 1913), in which the author states: "In declaring in Debt, except possibly upon an account, the plaintiff was required to set forth his cause of action with great particularity. Thus, the count in Debt must state the quantity and description of goods sold, with details of the price, all the particulars of a loan, the names of the persons to whom money was paid with the amount of each payment, the names of the persons from whom money was received to the use of the plaintiff with the amounts of each receipt, the precise nature and amount of services rendered. In Indebitatus Assumpsit, on the other hand, the debt being laid as an inducement or conveyance to the assumpsit, it was not necessary to set forth all the details of the transaction from which it arose. It was enough to allege the general nature of the indebtedness, as for goods [Hughes v. Robotham, Pop. 30, 79 Eng. Rep. 1150 (1592); Woodford v. Deacon, Cro. Jac. 206, 79 Eng. Rep. 180 (1608); Gardiner v. Bellingham, Hob. 5, 80 Eng. Rep. 155 (1612)], money lent [Rooke v. Rooke, Cro.Jac. 245, 79 Eng. Rep. 210 (1610)], money paid at the defendant's request [Moore v. Moore, 1 Bulst. 169, 80 Eng. Rep. 859 (1611)], money had and received to the plaintiff's use [Babington v. Lambert, Moore 854, 72 Eng. Rep. 950 (1616)], work and labor at the defendant's request [Russell v. Collins, 1 Sid. 425, 82 Eng. Rep. 1196 (1669)], or upon an account stated [Brinsley v. Partridge, Hob. 88, 80 Eng. Rep. 238 (1611); Vale v. Egles, Yelv. 70, 80 Eng. Rep. 49 (1605)], and that the defendant being so indebted promised to pay. This was the origin of the common counts."

69. Hob. 5, 80 Eng. Rep. 155 (1612).

70. 5 Mod. 444, 87 Eng. Rep. 754 (1698). For a recovery of penalties forfeited under by-laws, see Barber Surgeons v. Pelson, 2 Lev. 252, 83 Eng. Rep. 543 (1679).

that a contractual remedy supposed to be based upon privity, agreement, consideration, promise, should be used to recover a fine imposed upon a man against his will," the extension was made in the latter part of the Seventeenth Century in the case of *London v. Garry*,[71] in which it was held that the action would lie to recover the custom dues, even though there was no express contract, where it appeared that under a Custom of London, persons exposing foreign goods for sale, which had been entered at the custom house, were required to pay a certain amount for displaying of said goods, and had refused to pay.

(C) *The Indebitatus Count for Money Had and Received*: *(1) Distinction Between Common Count for Money Had and Received and the Other Common Counts.* — According to Ames, the equitable principle that one person shall not unjustly enrich himself at the expense of another, lay at the foundation of most quasi-contracts, and this was particularly true as to the *Indebitatus* count for money had and received, which sounds in pure legal duty. The common counts involved an extension of Indebitatus Assumpsit into a field where no true common law debt existed and where no *assumpsit* could be made out, whereas the count for money had and received could be supported where money was legally due, but where there was neither a true common-law debt, nor an actual promise. The common count for money had and received, therefore, is distinguished from other common counts, in that the latter fall within the field of promises implied in fact,[72] whereas the former fall within the field of promises implied in law, or, as Street observes, "to the True Field of Quasi-Contract,"[73] where the obligation to pay is imposed by operation of law, and entirely aside from any agreement. As illustrated by *Bonnell v. Foulke*,[74] decided in 1657, one of the earliest uses of the common count for money had and received involved a situation where money had been paid under a mistake, or on a consideration which had failed.

(2) The Extension of the Common Count for Money Had and Received is a Substitute for the Older Action of Account. — The action of Indebitatus Assumpsit, in the form of a common count for money had and received, appears to have first achieved importance as a substitute for the old action of account. As we saw

71. 2 Lev. 174, 84 Eng. Rep. 505 (1677).
72. 3 Street, Foundations of Legal Liability, c. XV, *The Action of Indebitatus Assumpsit*, 190 (Northport 1906).
73. *Ibid.*
74. 2 Sid. 4, 82 Eng. Rep. 1224 (1657).

earlier in our discussion of account,[75] one in receipt of money from another to be used in a certain way was required to give an accounting; if he did what he undertook to do, a plea setting forth this fact was a good answer to the action; if, for any reason, he failed to apply the money in the disguised manner, the plaintiff would recover the amount received in Account; if, by mutual mistake or by fraudulent representations of the defendant, money was paid to the defendant, the plaintiff might once more recover in Account.[76] And at this point it should also be recalled that once the exact amount due was ascertained in Account, Debt could be used to recover it, and it was for this very reason that Account and Debt became concurrent remedies. Now, by reason of the fictitious promise in Indebitatus Assumpsit — a promise implied in law as distinguished from one implied in fact — became a concurrent remedy with Debt on simple (executed) contract, and which, by a still further extension into the field of quasi-contractual obligations, made it possible to establish the action of Indebitatus Assumpsit for money had and received, by which, as previously mentioned, it was held in the early case of *Bonnell v. Foulke,* that money paid to the defendant by mistake, might be recovered.

(3) Indebitatus Assumpsit for Money Had and Received, the Substitute for Account, Versus the Equitable Bill for an Accounting. — Street points out that the courts at first were reluctant to permit Indebitatus Assumpsit as a substitute for Account, as illustrated in the case of *Lincoln v. Par,*[77] decided in 1672, where it was held the action would not lie to recover money delivered to a factor, as the necessity of frequent discharges would involve the courts in procedural difficulties. But in *Arris v. Stukely,*[78] decided six years later, the action was permitted against one who had usurped an office by which the complainant recovered the amount received by him during his tenure in office. And shortly thereafter, in 1689, in the case of *Wilkyns v. Wilkyns,*[79] on a failure to account, the plaintiff recovered in Indebitatus Assumpsit for money had and received, with the court declaring it to be unnecessary to either allege or prove a promise to account. But this

75. See *The Action of Account,* Lecture XI, 117, in Ames, Lectures on Legal History (Cambridge 1913).
76. Anonymous, Comb. 447, 90 Eng. Rep. 582 (1696); Hewer v. Bartholomew, Cro.Eliz. 644, 78 Eng. Rep. 855 (1597).
77. Lincoln v. Topcliff, Cro.Eliz. 644, 78 Eng. Rep. 883 (1597).
78. 2 Mod. 260, 86 Eng. Rep. 1060 (1678); *cf.,* Woodward v. Aston, 2 Mod. 95, 86 Eng. Rep. 961 (1676).
79. Carth. 89, 90 Eng. Rep. 656 (1689); Tomkins v. Willshear, 5 Taunt. 431, 128 Eng. Rep. 756 (1814).

was not to say that Indebitatus Assumpsit, any more than the old action of Account, was to serve as an adequate remedy where the accounts between the parties were highly complicated. The line of demarkation, between the legal remedy in the form of an indebitatus count for money had and received and the equitable remedy in the form of an equitable bill for an accounting, was not easy to draw, but in the words of Street, "whichever that line is, it now marks the limits between the Legal and Equitable Jurisdiction."[80] Thus, in *Scott v M'Intosh*,[81] decided in 1809, it was held that Indebitatus Assumpsit would not lie upon running accounts between merchants, which decision was criticized only five years later by Chief Justice Gibbs in the early case of *Tompkins v. Willshear*.[82] And in *Thomas v. Thomas*,[83] decided in 1850, it was held that one tenant in common could not recover in Indebitatus Assumpsit against a co-tenant, as the Statute of 4 & 5 Anne,[84] by its terms, limited the action to account only. Street, however, takes the view that since the decision was based on statutory grounds, the decision was not to be construed as amounting to a reversion to the ancient doctrine that a bailiff could only be held liable for money received in an action of Account.

(4) Lord Mansfield's Exposition of the Count for Money Had and Received as in the Nature of a Bill in Equity. — It was Lord Mansfield's appreciation of "the marvelous flexibility of the Count for Money Had and Received,"[85] that led to its extension. In *Longchamp v. Kenny*,[86] he remarked, in referring to the indebitatus action for money had and received that "the Charge and Defense . . . are both governed by the true equity and conscience of the case." And it was his exposition of the thesis that the count for money had and received was in the nature of a bill in equity that has made the decision in *Moses v. Macferlan*[87] one of the landmarks of the common law. In that case the plaintiff, *A*, indorsed certain notes to *B*, to enable him to recover the money due

80. 3 Street, Foundations of Legal Liability, c. XV, *The Action of Indebitatus Assumpsit*, 191 (Northport 1906).
81. 2 Camp. 238, 170 Eng. Rep. 1142 (1809).
82. 5 Taunt. 431, 128 Eng. Rep. 756 (1814).
83. 5 Exch. 28, 155 Eng. Rep. 13 (1850).
84. C. XVI, § 27 (1705). And Indebitatus Assumpsit became available to enforce an award for money or for the performance of some other act provided there was present an express promise to perform the award. Penruddock v. Monteagle, 1 Rolle, Abridgment, 7(n), pl. 3 (London 1668). See, also, Squire v. Grevett, 2 Ld.Raym., 92 Eng. Rep. 141 (1704). And on the failure of consideration, see Holmes v. Hall, 6 Mod. 161, 87 Eng. Rep. 918 (1705).
85. 3 Street, Foundations of Legal Liability, c. XV, *The Action of Indebitatus Assumpsit*, 192 (Northport 1906).
86. 1 Doug. 137, 99 Eng. Rep. 91 (1779).
87. 2 Burr. 1005, 97 Eng. Rep. 676 (1760).

in his own name against C. Previous to the indorsement, however, B had agreed that A should not be liable for the payment of the money. But notwithstanding this agreement, B sued A in the Court of Conscience and secured judgment. A's agent thereupon paid the money due on the notes into court, from whence it was taken by B. A thereupon brought an action of Indebitatus Assumpsit on a common count for money had and received against B, thus raising an issue of law as to whether the money could be recovered in that form of action, or must be recovered upon the special agreement only?

In holding that the plaintiff, A, could waive his right to sue on the special agreement as to idemnity, and sue in Indebitatus Assumpsit for money had and received, Lord Mansfield declared: "This kind of Equitable Action,[88] to recover back money, which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies only for money which, *ex aequo et bono,* the defendant ought to refund: it does not lie for money paid by the plaintiff, which is claimed of him as payable in point of honour and honesty, although it could not have been recovered from him by any course of law; as in payment of a debt barred by the Statute of Limitations, or contracted during his infancy, or to the extent of principal and legal interest upon an usurious contract, or, for money fairly lost at play; because in all these cases, the defendant may retain it with a safe conscience, though by positive law he was barred from recovering. But it lies for money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition (express or implied); or extortion; or oppression; or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances."[89]

It will be observed that the defendant argued that Indebitatus Assumpsit was available to the plaintiff when the action of Debt would lie. This was certainly true, if one were speaking of the action of Indebitatus Assumpsit as it stood at the end of its second stage of development, that is, when, in order to sustain the action, the plaintiff was required to prove that there was an express promise to pay, made at the time the debt was created. But such an argument was out of place after Indebitatus Assumpsit had passed to the stage where it had been extended as in the instant

88. See article by Williston, *The Word "Equitable" and Its Application to the Assignment of Choses in Action*, 31 Harv. L. Rev. 822 (1918).
89. Moses v. Macferlan, 2 Burr. 1005, 1012; 97 Eng. Rep. 676, 680 (1760).

case, to obligations similar to but not quite identical to a true common-law debt. Lord Mansfield impatiently brushed aside this argument, declaring: "There is no foundation for it; Assumpsit will lie in many cases where Debt lies, and in many cases where it does not lie."[90]

(5) Constructive Contracts — Waiver of Tort and Suit in Indebitatus Assumpsit for Money Had and Received.[91] — As previously noted, the count for money had and received alleged that the money sued for had been received by the defendant to the plaintiff's use, which allegation was framed to cover the factual situation where money had been delivered by *A* to *B* for the benefit of *C*. Under the earlier law, *C's* remedy lay in an action of Account, and as the Indebitatus count for money had and received had originated as a substitute for Account, it was quite natural for the former to allege that *A* had delivered money to *B* "to the use of the plaintiff," *C*.

(a) The Incongruity of the Technical Words of the Count for Money Had and Received. — This allegation was not to be taken literally, as involving a trust relationship between plaintiff and defendant, as such an interpretation would be flatly contrary to the allegation of "being indebted," as found in the regular count. Ob-

90. *Id.* at 1008, 97 Eng. Rep. 676 at 678.

91. In general, on the waiver in tort and suit in Assumpsit for money had and received, see: *Treatises*: Bower, The Law of Conversion, c. X, *Waiver of Conversion*, §§ 559-593, 406-431 (Boston 1917); Fifoot, History and Sources of the Common Law, c. 15, *The Subsequent Development of Assumpsit*, c. *Quasi-Contract*, 365, 366 (London 1949); Jackson, Quasi-Contract in English Law, c. II, 285 (Cambridge 1936); Keener, Quasi-Contracts, c. III, *Waiver of Torts*, 159-213 (New York 1893); Keigwin, Cases in Common Law Pleadings, Bk. I, c. III, *General Assumpsit*, § 79, *Constructive Contracts*, 221 (2d ed., Rochester 1934); Pomeroy, Code Remedies, c. III, § 387, 515, *When Tort is Waived and Suit is Brought Upon Implied Promise* (4th ed. by Bogle, Boston 1904); Shipman, Handbook of Common Law Pleading, c. VIII, *Actions of Assumpsit (Special and General)*, § 61, 162-164 (3d ed. by Ballentine, St. Paul 1923); 3 Street, Foundations of Legal Liability, c. XV, *The Action of Indebitatus Assumpsit*, 195-199 (Northport 1906); Winfield, The Province of the Law of Tort, c. IV, (Cambridge 1931); Woodward, Quasi-Contracts, c. III, 118 (Boston 1913).

Articles: Cohen, *Change of Position in Quasi-Contract*, 45 Harv. L. Rev. 1333 (1932); Corbin, *Waiver of Tort and Suit in Assumpsit*, 19 Yale L.J. 221 (1910); Deinard, *Election of Remedies*, 6 Minn. L. Rev. 341, 358-362, 480 (1922); House, *Unjust Enrichment: The Applicable Statute of Limitations*, 35 Cornell L.Q. 797 (1950); Keener, *Waiver of Tort and Suit in Assumpsit*, 6 Harv. L. Rev. 223, 268 (1892); King, *The Use of the Common Counts in California*, 14 So. Calif. L. Rev. 288, 289, 300-305 (1941); Langmaid, *Quasi-Contract—Change of Position by Receipt of Money in Satisfaction of a Preexisting Obligation*, 21 Calif. L. Rev. 311 (1933); Teller, *Restitution as an Alternative Remedy for a Tort*, 2 N.Y.L.F. 40 (1956).

Comments: *Action—Assumpsit—Quasi-Contracts—Waiver of Tort—Implied Assumpsit as an Alternative Remedy in Certain Classes of Torts*, 11 Minn. L. Rev. 532 (1927); *Quasi-Contract—Assumpsit for Use and Occupation Against a Trespass in Modern Cases*, 30 Mich. L. Rev. 1087 (1932); *Quasi-Contracts—Waiver of Tort—Assumpsit Against One Joint Tortfeasor as Bar to Tort Action Against Others*, 28 Yale L.J. 409 (1919).

Annotations: *Owner's Right to Waiver of Tort of Conversion and to Maintain Action on Contract Implied at Law to Recover Profits Which Inured to Converter from Wrongful Chatel*, 169 A.L.R. 143 (1947); *Waiver of Tort and Recovery in Assumpsit for Conversion as Dependent on or Affected by Sale of Goods by the Converter*, 97 A.L.R. 250 (1935).

viously, one who is a custodian of money cannot at the same time stand in the position of a debtor. This incongruity in the technical words of the count also appeared in a case where the defendant had lawfully acquired the money sued for. Where, therefore, the count for money had and received was to be invoked against a tortfeasor, the phrase "to the plaintiff's use," became surplusage or a mere fiction, or the statement of a legal conclusion. In consequence, where the obligation grew out of a bailment or trust, the pleaders sometimes omitted the phrase, or, in conformity with the fact, alleged that the defendant had received the money to his own use.[92] In practice, this situation led to the practice of pleaders to always insert an allegation of a receipt to the plaintiff's use in actions for money had and received.

(b) The Count for Money Had and Received Becomes Available Where the Defendant Had Converted the Plaintiff's Chattels. — The practice just referred to above came under question in the case of *Lamine v. Dorrell*,[93] decided in 1705. In this case it appeared that the usual count for money had and received to the plaintiff's use was inserted against a pretended administrator who had converted the chattels of the decedent by selling them. At the trial it was urged that the defendant had converted the chattels to his own use, having sold the chattels under a claim of title, and hence could not be said to have secured the proceeds to his own use. This view was rejected by the court, which held for the plaintiff. Such holding made the common count for money had and received in Indebitatus Assumpsit a concurrent remedy with Trover in those cases where a defendant converted the plaintiff's chattels by selling and receiving value therefor.[94] Thus, there was an extension of Indebitatus Assumpsit for money had and received at the very point where earlier, in the case of *Tottenham v. Beddingfield*,[95] the courts had refused to permit the action of Account. Street put the development in dramatic language when he declared: "This was undoubtly one of the most remarkable perversions of a Common-Law Remedy that has ever been permitted, yet so gradually had legal theory approached this goal that the extraordinary nature of the holding was hardly perceived. In Trover for Conversion by selling, the plaintiff alleges that the defendant converted the goods to his own use. In Indebitatus Assumpsit

92. Palmer v. Stavely, 12 Mod. 510, 88 Eng. Rep. 1488 (1701). *Cf.*, Noseworthy v. Wildman, 2 Keb. 615, 84 Eng. Rep. 387 (1671).
93. 2 Ld.Raym. 1216, 92 Eng. Rep. 303 (1705).
94. *Cf.*, Phillips v. Thompson, 3 Leon. 191, 83 Eng. Rep. 645 (1684).
95. 3 Leon. 24, 74 Eng. Rep. 517 (1573).

upon the same facts the plaintiff alleges that the proceeds came to the hands of the defendant to the plaintiff's use. A more inconsistent use of two apparently incompatible Legal Fictions cannot be found elsewhere."[96]

(6) Limitation Upon Doctrine That Plaintiff May Waive the Tort and Sue in Assumpsit for Money Had and Received. — The rationale of *Lamine v. Darrell*[97] was that where one converts the goods of another, the owner might ratify the act as if the sale was made with his consent, the defendant being prohibited from showing that in fact the act of conversion was really tortious. Nevertheless, the case was and is significant as establishing the doctrine that the plaintiff, as against a tortfeasor, might waive the tort and sue on a common count in Indebitatus Assumpsit for money had and received. There were several factors making this procedural development highly desirable; *one* was that Trover, its chief competitor, could not be maintained against a personal representative after the death of the converter; whereas there was no such impediment when suing in Assumpsit; the other was that since ordinarily the contract Statute of Limitations was shorter than the tort Statute of Limitations, the right to waive the tort and sue in contract frequently enabled a plaintiff to escape the bar of a plea of the statute.

(a) The Count for Money Had and Received Where the Conversion Consisted in Selling the Chattels and the Action was to Recover the Proceeds. — In legal theory an actual conversion of the chattel into money or its equivalent was regarded as essential to an action on a count for money had and received. Street assigns two reasons for this; *one,* that since the count is equitable in theory, it presupposes a property right on which liability can be predicated, the converter being held liable for the proceeds acquired, and as a sort of constructive trustee; *two,* since the court is in *consimili casu* with Debt, it is subject to the same limitations of Debt, and hence may be supported only when there is a duty to turn over money or goods ascertained in amount. This requirement is satisfied where there is an actual sale of the converted chattels, but not in the absence of such a sale. The duty upon which the implied contract involved is here predicated upon "is a duty to disgorge the proceeds of an unlawful acquisition, and not upon the mere general duty to

96. 3 Street, Foundations of Legal Liability, c. XV, *The Action of Indebiatus Assumpsit,* 196 (Northport 1906).
97. 2 Ld.Raym. 1216, 92 Eng. Rep. 303 (1705).

compensate for injury done."[98] It follows, therefore, that the plaintiff, in actions of this description, is limited to a recovery of what the defendant actually received, and not their actual value.[99]

(b) In the United States There is a Division of Authority as to When a Count for Money Had and Received May be Maintained. — The majority rule in the several states of the United States is that a count in Indebitatus Assumpsit may be maintained in all cases upon a fictitious sale, and that as such the remedy is concurrent with Trover, where the tortfeasor actually converts and appropriates the chattels as his own.[100] The minority view is that the count for money had and received is the only form of Assumpsit which will lie against a tortfeasor, and since such action is available only when there is a sale, followed by a conversion into money or its equivalent, in such jurisdictions, a tortfeasor who converts, but does not sell to another, cannot be held liable upon an implied contract.[101] The leading case representing this point of view is *Jones v. Hoar,*[102] where the defendant entered land, cut the timber thereon, and carried it away. The court held that the defendant was not liable without a showing that he sold the wood. The appropriation of the wood was merely incidental to the real cause of action, that is for trespass to realty.[103] Street, in criticism of the *Jones* case, takes the position that the court, in declaring that Assumpsit would in no case lie upon an implied promise unless there was a subsequent sale of the property, was incorrect. Such a statement, he observes, might be true of Assumpsit in the form of the count for money had and received, but has no application to Assumpsit in the form of a count for goods sold and delivered.

Finally, as an incident of the cases indulging in the fiction of a sale, it has been held that Indebitatus Assumpsit will lie for services rendered by a person unlawfully imprisoned,[104] or against one who entices the apprentice of another.[105] Thus, it may be said that where one person converts the property of another or commits a tort against another's property, to the benefit of his own estate, at the election of the owner, the Law will impose upon the

98. 3 Street, Foundations of Legal Liability, c. XV, *The Action of Indebitatus Assumpsit,* 197 (Northport 1906).
99. King v. Leith, 2 T. R. 142, 100 Eng. Rep. 77 (1787).
100. Walker v. Duncan, 68 Wis. 624, 32 N.W. 689 (1889).
101. Browman v. Browman, 17 Ark. 599 (1856); Thompson v. Banks, 43 N.H. 540 (1862).
102. Jones v. Hoar, 5 Pick. (Mass.) 285 (1827).
103. 3 Street, Foundations of Legal Liability, c. XV, *The Action of Indebitatus Assumpsit,* 199, n.2 (Northport 1906).
104. Patterson v. Prior, 18 Ind. 440 (1862).
105. Lightly v. Clonston, 1 Taunt. 112, 127 Eng. Rep. 774 (1808).

wrongdoer a contractual duty to pay the injured party the value of the property converted, and such duty may be enforced by some form of the action of Indebitatus Assumpsit.

(c) Indebitatus Assumpsit in no Form Will Lie to Recover Damages for a Merely Destructive Trespass. — It was not possible to recover in Indebitatus Assumpsit for destructive trespasses; it was essential that the estate of the tortfeasor be unjustly enriched. This limitation was a hangover of the fact that Assumpsit was a substitute for Debt, wheren a *quid pro quo* must pass from the creditor to the debtor, so that the loss of the plaintiff was the gain of the debtor. Mere detriment to the plaintiff was not enough, nor did a mere legal duty to make reparation for a destructive trespass raise a promise to pay damages.[106] Nor did this destruction lose its significance with the abolition of the forms of action, as it is involved with the question as to whether a right of action survives after the death of a party. Moreover, aside from statute, the survival of rights of action was not affected by the abolition of the forms of action. The distinction was clearly presented in the case of *Phillips v. Homfray*,[107] in which the defendant trespassed upon the plaintiff's premises, appropriated minerals and transported them over the plaintiff's roadways. In Assumpsit, after defendant's death, it was held that the plaintiff could not recover for damages done to the realty, and for the use of the roadways in transporting the mineral, as the injury complained of lay purely in tort; but recovery could be had for the minerals converted, as in such case the defendant was liable on an implied contract.

(V) *Quasi-Contract*[108] — From the foregoing, it is clear that because of its relationship to the older actions of Account and Debt, Indebitatus Assumpsit was the proper remedy upon all quasi-contractual obligations similar to but not quite identical with Debt. As we say in the chapter on the action of Debt,[109] that action was utilized to enforce obligations grounded upon a record, or upon a customary, offical or statutory duty; in short, it lay to collect

106. Fanson v. Linsley, 20 Kan. 235 (1878).

107. 24 Ch. Div. 439 (1883).

108. In the New York case of Miller v. Schloss, 218 N.Y. 400, 407, 113 N.E. 337, 339 (1916), Collin, J., observed: "A *quasi* or constructive contract rests upon the equitable principles that a person shall not be allowed to enrich himself unjustly at the expense of another. In truth it is not a contract or a promise at all. It is an obligation which the law creates, in the absence of any agreement, when and because the acts of the parties or others have placed in the possession of one person money, or its equivalent, under such circumstances that in equity and good conscience he ought not to retain it, and which *ex aequo et bono* belongs to another. Duty, and not a promise or agreement or intention of the person sought to be charged, defines it. It is fictitiously deemed contractual in order to fit the cause of action to the contractual remedy."

109. See *The Action of Debt*, Lecture VIII, 88, in Ames, Lectures on Legal History (Cambridge 1913).

customary duties as well as judgment debts, to recover money paid for an object which the payee had failed to carry out, and to enforce penalties created by by-laws or by statutes, and to enforce the fundamental conception that no one should be permitted unjustly to enrich himself at the expense of another.[110] The action of Account, which was limited by specific legal relationships, was used to enforce a duty derived therefrom, and which was not voluntarily assumed, as in the case of the constructive bailiffs and receivers; it also included liability to return money paid by mistake. By way of contrast, Assumpsit, delictual in origin, but now "severed from its tortious stock, was associated with the consensual conception which was wanting in the older Writs."[111] But any design of limiting the action to consensual factual situations went by the board when Indebitatus Assumpsit was extended into the field of obligations where services were rendered or goods delivered in such a manner as to raise a presumption that they were to be paid for, but where Debt would not lie, as there was no sum certain due. And as Debt had been used to cover claims not based on agreement, if Indebitatus Assumpsit was to serve as a substitute for that action, it naturally had to accept the type of claims remediable in the action of Debt. Such claims are now inaccurately, but conveniently grouped under the title of quasi-contract.

(A) *Quasi-Contract Grounded on a Record.* — Quasi- contracts founded upon a record were not remediable by Indebitatus Assumpsit in any form, the proper remedy upon such obligations was some form of the action of Debt, such, for example, as Debt upon a judgment.

(B) *Quasi-Contracts Grounded on a Customary, Official or Statutory Duty.* — Jackson, in his splendid work on The History of Quasi-Contract,[112] after noting the disagreement between Ames and Holdsworth concerning the character of Indebitatus Assumpsit and as to whether "Assumpsit, independent of real agreement"[113] appeared before the end of the Seventeenth Century, declared: "There is some evidence that the Queen's Bench during the last quarter of the Sixteenth Century was inclined to consider Indebitatus Assumpsit as a substitute for Debt in a wide range of cases, citing as authority the cases of *Stanton v. Suliard,*[114] decided in

110. Ames, Lectures on Legal History, c. XIV, *Implied Assumpsit,* 160 (Cambridge 1913).
111. See Fifoot, History and Sources of the Common Law, c. 15, *The Subsequent Development of Assumpsit,* 363 (London 1949).
112. Pt. II, f. 18, *The Rise of Indebitatus Generally,* 40 (Cambridge 1936).
113. *Ibid.*
114. Cro.Eliz. 654, 78 Eng. Rep. 893.

1597 or 1598, Lord North's Case,[115] decided in 1588 in Queen's Bench, then interested in extending the scope of Assumpsit, and *Gurney v. Somer,*[116] decided in 1594.

However this may be, it is certain that such actions were freely brought shortly after the middle of the Seventeenth Century. Before proceeding with this story, however, it may be well to observe that such duties as those of the innkeeper[117] to entertain, of the carrier[118] to transport, or of the smith to repair,[119] and others, fell within the scope of the action of Trespass on the Case for the unskillful performance of a task undertaken, whereas Indebitatus Assumpsit was available only where a duty existed to pay money or a specified amount of chattels. And where the obligation involved was on an implied warranty, Special Assumpsit was the remedy. It should also be noted that while Debt originally was the proper remedy to enforce a customary or statutory debt, the right to sue in Indebitatus Assumpsit came only after a struggle, the reason being that in theory such cases did not fall within the principle of *Slade's Case.*[120] This was true despite the fact that from that date (1603), Debt and Indebitatus Assumpsit were concurrent remedies, except where the debt was due by a record, a specialty or for rent.

It was against this general background, and some seventy years after *Slade's Case,* that the issue as to the scope of Indebitatus Assumpsit was clearly presented in the case of *City of London v. Goree,*[121] decided in 1677. It appeared that the plaintiffs brought Indebitatus Assumpsit for money due by scavage, to which the defendant pleaded, *Non-Assumpsit.* The Jury returned a special verdict finding that there was a duty to pay, based upon an existent custom, but that there was no express promise. The Court rendered upon this verdict a unanimous judgment for the plaintiffs. Observing that since the defendant had not agreed to pay, there could be no liability in contract, and as there had been no tort committed, there could be no liability in tort. Nevertheless, said the Court, the defendant was liable on the theory that wherever Debt would lie, Indebitatus Assumpsit would lie, even though the obli-

115. 2 Leon. 179, 74 Eng. Rep. 458.
116. Cro.Eliz. 336, 78 Eng. Rep. 585.
117. Anonymous, Keil. 50, pl. 4, 72 Eng Rep. 208 (1503).
118. Jackson v. Rogers, 2 Show. (K.B.) 327, 89 Eng. Rep. 968 (1684).
119. Steinson v. Heath, 3 Lev. 400, 83 Eng. Rep. 750 (1694). For other examples see Ames, Lectures on Legal History, c. XIX, *Implied Assumpsit,* 161 (Cambridge 1913).
120. 4 Co. 92b, 76 Eng. Rep. 1075 (1603).
121. 2 Lev. 174, 83 Eng. Rep. 505.

gation involved could only be described as arising *quasi-ex contractu.*

Professor Fifoot observes this view was both convenient and popular, yet looked at askance by such a precise mind as that of Lord Holt,[122] and the story of his opposition may be found in the cases of *Shuttleworth v. Garrett,*[123] and *City of York v. Toun.*[124] Thereafter, on authority by *City of London v. Goree,*[125] Indebitatus Assumpsit was used for the recovery of money forfeited under a by-law,[126] for weighage,[127] for fees upon a knighthood,[128] and upon a foreign judgment, with the result that the fiction "of a Promise Implied in Law became fixed in our Law."[129]

(C) *Quasi-Contract Grounded Upon the Concept of Unjust Enrichment.* — There were, however, over and above quasi-contracts based upon a record, or upon a customary, official or statutory duty, certain situations where a person as Lord Mansfield said, was bound by the ties of justice and equity to pay for an unjust enrichment. Cases of this character, brought within a common formula under which money had been received to the defendant's use, fell under four heads:

(1) Where the Plaintiff Sued for Money Which the Defendant Acquired by Misconduct. — Early manifestations of this doctrine found expression in the action of Account where the plaintiff sought recovery of profits made by a defendant who had wrongfully usurped an office.[130] Although no tort may have been involved, in this type of case delictual language was used. And it was a consequence of this development that shortly thereafter Indebitatus Assumpsit became concurrent with Trover.[131] As we have seen in our discussion of waiver of tort and assumpsit for money had and received, there were several advantages in this new procedural device, the pleadings were less complicated, there was no necessity to allege and prove the exact value of the goods con-

122. Fifoot, History and Sources of the Common Law, c. 15, *The Subsequent Development of Assumpsit,* 364 (London 1949).
123. 3 Mod. 240, 87 Eng. Rep. 156 (1688).
124. 5 Mod. 44, 87 Eng. Rep. 754 (1700).
125. 2 Lev. 174, 83 Eng. Rep. 505 (1667).
126. Barber Surgeons v. Pelson, 2 Lev. 252, 83 Eng. Rep. 543 (1679).
127. Duppa v. Gerrard, 1 Show. (K.B.) 78, 89 Eng. Rep. 461 (1688).
128. Tobacco Co. v. Loder, 16 Q.B. 765, 117 Eng. Rep. 1074 (1851).
129. See Ames, Lectures on Legal History, c. XIV, *Implied Assumpsit,* 162 (Cambridge 1913).
130. Arris v. Stukely, 2 Mod. 260; 86 Eng. Rep. 1060 (1678).
Under this heading the cases involving a waiver of tort and suit in Assumpsit on a common count for money had and received, earlier discussed under constructive contracts, would fall.
131. Lamine v. Dorrell, 2 Ld.Raym. 1216, 92 Eng. Rep. 303 (1705).

verted by the defendant, and the action survived the death of the wrongdoer.[132]

(2) Where the Plaintiff Sued for Money Paid by Mistake. — Where, for example, money was to be applied in payment of a debt mistakenly supposed to be due from the plaintiff to the defendant, and because of a misunderstanding on the part of both parties, or because of fraudulent misrepresentation of the defendant, the application of the money as intended became impossible, the money originally was recoverable in Account.[133] The same principle was now applied where an underwriter paid money on a marine insurance policy under the mistaken idea that the ship had been lost.[134]

(3) Where the Plaintiff Sued for Money Paid as a Result of Undue Influence or Improper Authority. — The rule applied whether the force which led to the unjust enrichment was private or public. Thus, in *Newdigate v. Davy,*[135] the penalties imposed illegally by the Court of High Commission after the Reign of James II (1685-1689) were recovered by those against whom they had been levied, whereas in *Astley v. Reynolds,*[136] money and goods taken by duress were recovered.

(4) Where the Plaintiff Sued for Money Paid on a Consideration Which Had Wholly Failed. — Illustrative of this type of case was *Martin v. Sitwell,*[137] where one who had no insurable interest, was permitted to recover an amount paid as a premium on the theory of a consideration that failed.

In the cases mentioned under the four heads above the connecting and common strand present in all the decisions was the theory of unjust enrichment. Although present before his time, it took "the advent of a dominant personality [Lord Mansfield] to proclaim the principle of unjust enrichment as a single and all-sufficient *ratio decidendi.*"[138]

The Action of Indebitatus Assumpsit in Retrospect

IT has been said that Indebitatus Assumpsit was an action on the Case in the nature of Debt. Why, then, was not an action of Debt on the Case developed directly from Debt, analogous to

132. On the advantages of Indebitatus Assumpsit, see Winfield, Province of the Law of Tort, c. IV, 384 (Cambridge 1931).
133. Hewer v. Bartholomew, Cro.Eliz. 614, 78 Eng. Rep. 855 (1597); Cavendish v. Middleton, Cro.Car. 141, 79 Eng. Rep. 725 (1628)
134. Tomkyns v. Barnet, Skin. 411, 90 Eng. Rep. 182 (1693).
135. 1 Ld.Raym. 742, 91 Eng. Rep. 1397 (1694).
136. 2 Strange 915, 93 Eng. Rep. 939 (1731).
137. 1 Show (K.B.) 156, 89 Eng. Rep. 509 (1690).
138. Fifoot, History and Sources of the Common Law, c. 15, *The Subsequent Development of Assumpsit,* 366 (London 1949).

Trespass on the Case or Detinue on the Case, known as Trover. Street[139] suggests that the reason is to be discovered in the fact that the scope and character of Debt, one of the oldest of the common-law remedies, had become set in a mould prior to the time when the courts were free to frame new writs similar to but not quite identical with existing forms of action. In consequence, when the need for an action to serve as a substitute for Debt developed, an action on the Case issued not from Debt, as might have been expected, but from Assumpsit, which, after all, was a form of Case. And, as Indebitatus Assumpsit was extended into the field of quasi-contract, the newly developed remedy, operating through the procedural device of the common counts, assumed the character and feature of the original action of Trespass on the Case, from which Indebitatus Assumpsit originated. As an action of Debt on Case, derived from the tort action of Assumpsit, it partakes more of Case than with either Assumpsit or Debt. Indebitatus Assumpsit, like Case, is grounded on legal duty. And to the fact that the action is in reality a specialized form of the action of Trespass on the Case, in disguise, may be attributed that "remarkable flexibility which has enabled the Courts to extend it with such freedom into the Field of Pure Legal Duty."[140]

Standing at the point of confluence of three great actions — Debt, Trespass on the Case and Assumpsit — Indebitatus Assumpsit has inherited certain significant characteristics from each of them.

From the action of Debt, it derived the proprietary characteristic which permits it to be maintained where there is due a certain sum of money or a specific number of chattels in the nature of a debt.

From Trespass on the Case, to which it has almost made a complete reversion, it inherited the quality of great flexibility and power, which accounts for its rapid expansion as a remedy for one obligation after another.

From the tort action of Assumpsit and the contract action of Special Assumpsit, it derives its form, its procedure and its theory.

As we have seen, the new remedy of Debt did not evolve directly from Case, but from Indebitatus Assumpsit. It was, therefore, according to Street, easier for the early common law mind, to "bridge a chasm in legal theory by means of such a Fiction as that

139. 3 Street, Foundations of Legal Liability, c. XV, *The Action of Indebitatus Assumpsit*, 204 (Northport 1906).
140. *Id.* at 205.

of an Implied Promise, than it is to say, once and for all, the defendant *ought* to pay this money *ex aequo et bono,* consequently he is under a legal duty to pay and an Action on the Case accordingly lies."[141]

PART II

SCOPE OF THE ACTION

Assumpsit — General or Special

As finally developed, the original tort action of Assumpsit, split up into two forms. Special Assumpsit was created by extending the tort action of *Trespass on the Case Super Se Assumpsit* for misfeasances and nonfeasances into the field of parol promises. Indebitatus Assumpsit was then created by extending Special Assumpsit into the field of Debt on simple (executed) contracts, and finally, through the device of the common counts, into the field of quasi-contract. As thus differentiated from Assumpsit, Special Assumpsit became the remedy for the breach of an actual, express promise contained in a contract entered into by the parties, whereas Indebitatus Assumpsit became the remedy for Debt in the field of simple (executed) contract, the action not being grounded upon a special contract or actual promise, but upon a promise implied by law from the existence of a legal duty to pay money for value received.

Contracts Implied in Fact and in Law

IN this connection, however, it should at once be observed that the term "Implied Contracts" has been and is used in at least two senses.

As used in one sense it means a tacit contract, implied as a matter of fact from the conduct of the parties, because their course of conduct shows agreement, as where one of them has delivered goods to or performed services for another, at the other's request or with the other's knowledge, and under such circumstances as to raise a presumption that the other, as a reasonable man, must have known that payment for them was expected. Although no express promise to pay was made, the law recognizes that by his conduct he impliedly promised to pay, which promise to pay, thus implied in fact, is also an express promise to pay, for which Indebitatus Assumpsit on a quantum meruit or a quantum valebant count is not the proper remedy.[142]

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141. *Ibid.*
142. Ames, Lectures on Legal History, c. XIV, *Implied Assumpsit,* 154-159 (Cambridge 1913).

The term "Implied Contract," as used in a second sense, is also applied to promises implied or created by operation of law, without any agreement in fact between the parties, and oftentimes, even when the circumstances actually negative the existence of any agreement whatsoever, as where one pays money which another person ought to have paid, or receives money which another ought to have received, or in some cases, where benefits are conferred upon another without any agreement. The promise thus said to be implied in law is a sheer fiction, descriptive of a true common-law debt, or a quasi-contractual obligation similar to but not measuring up to the purpose of extending Indebitatus Assumpsit into the field of obligations where there was no express promise to pay, but where, nevertheless, because of the circumstances, they were expected to be paid for. Such obligations were not contractual, but quasi-contractual.[143]

The Limitations of Indebitatus or General Assumpsit

SINCE Indebitatus or General Assumpsit was created by extending Special Assumpsit into the field of Debt on Simple (Executed) Contract, and since thereafter, it became a substitute for Debt in the same field, its scope originally, or at least during its first two stages of development, was governed by the two earlier and contributing actions. The resulting limitations, according to Keigwin,[144] may be listed under five heads:

(1) *It is Not Available Where There is No Simple (Executed) Contract.*—As Indebitatus developed as a substitute for Debt upon Simple (Executed) Contract, it normally would not lie, unless an indebtedness based on a contract of that character, was present. This was true through the first two stages of the development of the action in which there had to be a debt, plus a promise to pay said debt, made subsequent to or at the time the debt was created. After the use of the common counts made it possible to extend the action into the field of quasi-contracts, the obligation on which the action was grounded was sometimes less than a real common-law debt. Nevertheless, it was true that an action of Indebitatus Assumpsit could not be sustained, as it existed at the end of its first two stages of development, or at the end of its third, where the liability of the defendant was grounded on the breach of a specialty contract, for the failure to pay a debt of record, or for a tort.

143. Wood v. Ayres, 39 Mich. 345, 33 Am. Rep. 396 (1878).
144. Keigwin, Cases in Common Law Pleadings, Bk. I, c. III, *The Statutory Actions*, 215-217 (2d ed. Rochester 1934).

(II) *It is Not Available Where There is No Promise, Either Express or Implied.* — It is generally said that Indebitatus Assumpsit cannot be supported unless there is either an express or implied promise.

If there was an existent debt, we have seen that the action would lie, if a subsequent promise to pay was made, and also, if the promise to pay was made at the time the debt was created. Such promise might be express in the sense of having actually been made, or it might also be express where implied in fact from the facts of the transaction, or as the result of a tacit understanding as indicated by the mutual conduct of the parties.

The factual situation, however, may be one in which the law, by operation of law, imposes a duty of payment irrespective of the defendant's assent, as where the law imposes upon a man an obligation to furnish food, clothing and shelter to his wife and children. Such a legal duty will be implied even in the face of a protest.[145] Thus, it appears that the law does not always imply a promise to pay even where the defendant is legally liable to the plaintiff, as where the defendant has asserted an adverse right, or has repudiated liability, and where the facts of the case are of such a character as not to ground an undertaking to pay. Obviously, under such circumstances Indebitatus Assumpsit will not lie.[146]

(III) *It is Not Available Where There is No Debt, or No Obligation Similar to a Debt.* — As Indebitatus Assumpsit, in its first two stages of development, was merely a substitute for Debt on Simple (Executed) Contract, the action could not be supported except on proof of a true debt. And, of course, that form of the action which lay upon the common counts could not be maintained, unless the plaintiff could show a debt similar to but not identical with a common-law debt, from which a legal obligation, independent of the debtor's assent or assumption, could be created or inferred. It seems clear, therefore, that the action must be grounded on a factual situation, or transaction, from which, standing alone, and without the aid or presence of any form of agreement, will impose upon the debtor, by operation of law, an obliga-

145. *Federal*: Bank v. Rice, 161 Fed. 822, 88 C.C.A. 640, 15 Ann. Cas 450, 23 L.R.A. (n.s.) 1167 (1908); *Massachusetts*: Earle v. Coburn, 130 Mass. 596 (1881). See also the following cases: *Illinois*: Gloyd v. Hotel La Salle Co., 221 Ill. App. 104 (1921); *Massachusetts*: Putnam v. Glidden, 159 Mass. 47, 34 N.E. 81, 38 Am. St. Rep. 394 (1893); Whiting v. Sullivan, 7 Mass. 107 (1810); *New York*: Livingston v. Akeston, 5 Cow. (N.Y.) 531 (1826); *English*: Alfred v. Fitzjames, 3 Esp. 4, 170 Eng. Rep. 518 (1799).

146. Chicago v. Ry. Co., 186 Ill. 300, 57 N.E. 795 (1900); Lee Co. v. Potter, 123 Mass, 28 (1877); Gillett v. Maynard, 5 Johns. (N.Y.) 85, 4 Am. Dec. 329 (1809).

tion to pay. Hence, in cases involving contracts of guaranty and suretyship, insurance policies, wagers and warranties, as well as all executory contracts, calling for future acts, Indebitatus Assumpsit was not available, as it could not succeed in those cases, where in order to establish a liability, it was necessary for the plaintiff to allege and prove some form of negotiation collateral to the transaction as well as an assumption on the part of the defendant over and above the plaintiff's performance.[147]

(IV) *It is Not Available Where the Amount Sought to be Recovered is Uncertain.* — One of the handicaps of Debt was that the declaration was required to set forth the debt with extreme particularity, that is, to allege a sum certain due. Therefore, as Indebitatus was created to serve as a substitute for Debt, it was subject to the same handicap or limitation. Nor will that form of the action covered by the common counts lie where the amount sought to be recovered is indeterminate in character, as damages for some delinquency of duty, or where the obligation is dependent upon some contingent event.[148] And, of course, the debt involved must be payable in money, in some specific form of currency, or by giving as security, a bill or note, and not in goods.

(V) *It is Not Available Upon an Executory Express Contract.* — Again, as Debt would lie only on a Simple (Executed) Contract, Indebitatus Assumpsit, being an adaptation of Debt on Simple (Executed) Contract, was available only on the same type of debt; it was not available as long as an express contract remained executory and subsisting. A contract was said to be executory until performed on one side, as, for example, where *A* agrees to deliver ten cords of wood to *B*, and *B* promises to pay for the wood. Until *A* delivers the wood, the contract is executory; thereafter, it is executed. And a contract is regarded as subsisting until it is performed according to its terms, or is abandoned, rescinded or superseded by the consent of the parties, or by conduct on the part of one or the other of them which is of such a character as to terminate the obligation of the contract.[149] Where the contract re-

147. Page v. Bank of Alexandria, 7 Wheat. 35, 5 L. Ed. 390 (1822); Hersey v. Northern Assurance Co., 75 Vt. 441, 56 Atl. 95 (1903); Miller v. Wilbur, 76 Vt. 73, 56 Atl. 280 (1903).

148. Mitchell v. Gile, 12 N.H. 390 (1841).

149. In Clark v. Smith, 14 Johns. (N.Y.) 326 (1817), the plaintiff declared in two counts, one on an express contract under which the plaintiff agreed to make for the defendant a certain number of bricks, for a price of $80; the other count was for work and labor done of the value of $80.

At the trial, the plaintiff stated that the contract mentioned in the first count was in writing and was lost, whereupon the court said he had failed to satisfactorily account for the nonproduction of the contract. Thereafter, the plaintiff was permitted to prove that he had made bricks, that the defendant had accepted them, and that they were worth

mains in effect, but is broken by one of the two parties the party injured by the breach must sue in Special Assumpsit. Indebitatus Assumpsit is not available.[150]

PART III

EXPRESS CONTRACTS NOT EXCLUDING INDEBITATUS ASSUMPSIT

ONCE the first two developmental stages of Indebitatus Assumpsit, in which it had always been necessary to allege and prove an express promise, had been passed, the general rule of law was that if there were an executory special contract, Indebitatus Assumpsit, as a substitute for Debt on Simple (Executed) Contract and Indebitatus Assumpsit on the common counts, would not lie; for the law would not and will not imply a promise to pay, except where the consideration is executed on the plaintiff's part and a duty arises to pay the value of what he has done.[151]

Or, to put the matter in another way, an express contract, under which a transaction has been partially or wholly executed, does not always exclude an action in Indebitatus or General Assumpsit for money due on such transaction. The factual situation in that transaction may give rise to an implied contract, either collateral to the actual contract or wholly displacing it. In such a case the money demandable upon the promise legally imputable to the debtor may be recovered by suing on a common count.

The leading English case on the rule just stated is *Cutter v.*

$80. The defendant objected that such proof was not admissible as it appeared that the transaction was controlled by the actual written contract. His objection having been overruled, the defendant took an exception. A verdict and judgment was given the plaintiff, but on review, the judgment was reversed, the Court declaring: "There was no pretense on the part of the plaintiff that the special contract was rescinded or that the same was not still subsisting and in full force; nor but that the work and services performed were done under and in pursuance of the written contract. To allow the plaintiff, under such circumstances, to abandon the written contract would be establishing a dangerous principle, by enabling a party, at any time, by his own act to put an end to his contract when he was dissatisfied with it. No case has ever gone to this length. Whenever the special contract is still subsisting, and no act done or omitted by the one party which will authorize the other to consider the contract rescinded, the remedy must be on the special contract."

150. Wadell v. Phillips, 133 Md. 497, 105 Atl. 771 (1919); Ladice v. Seymour, 24 Wend. (N.Y.) 60 (1840); Robertson v. Lynch, 18 Johns. (N.Y.) 451 (1821); Wilt v. Ogden, 13 Johns. (N.Y.) 56 (1816).

151. See Cutter v. Powell, reported in 2 Smith, Leading Cases, 1, notes, 9 (13th ed. by Chitty, Denning & Harvey, London 1929); Theis v. Svoboda, 166 Ill. App. 20 (1911); Edward Thompson Co. v. Kollmeyer, 46 Ind. App. 400, 92 N.E. 660 (1910).

To recover in Assumpsit for breach of an executory contract of sale of corporate stock, plaintiff must declare specially on the contract, general counts alone not being sufficient except where payment is the only unperformed act. Thomas v. Mott, 78 W. Va. 113, 88 S.E. 651 (1916).

Where a special contract remains executory, the plaintiff must sue upon it. Kinney v. McNabb, 44 App. D.C. 340 (1916); Wadell v. Phillips, 133 Md. 497, 105 Atl. 771 (1919); Standard Fashion Co. v. Lapinsky, 84 W. Va. 523, 101 S.E. 152 (1919).

A claim for damages for breach of contract to do some act other than pay money must be specially pleaded. Cook v. Dade, 191 Mich. 561, 158 N.W. 175 (1916).

Powell,[152] which has been approved and followed in the leading American case of *Hersey v. Northern Assurance Co.*,[153] in which the plaintiff filed a declaration in Assumpsit, on two counts, neither of which was claimed to be good as a special count, to which the defendant demurred. And neither were good general Indebitatus counts, as each disclosed an express promise as an indispensable basis of recovery; and the allegations of facts, aside from the promise, were not such that the law would raise therefrom an implied promise. In reversing the judgment overruling the demurrer, the court said: "In the present case the facts aside from the promise, viz.: the plaintiff's ownership of the property, its destruction by fire without his fault, — even the payment of the premiums, — do not raise an implied promise by the defendant to pay; it is only the fact that it promised, upon certain conditions, to pay, that makes it liable. Consequently, at common law, the promise, the conditions, and the fullfillment of the conditions, must be set forth — in other words, the count must be special."[154]

When, therefore, will a debt arise out of what the plaintiff has done under an express or special contract? The occasion when such an event may occur may be grouped under the following heads:

(I) *Where the Facts Underlying the Express Contract are Equivalent to the Legal Duty Created by the Contract.* — Where the express contract in question creates no other obligation than that which the law would normally imply from the existing factual situation, a common count in Indebitatus Assumpsit will lie. Thus, in *Keene v. Meade*,[155] where a promissory note had been given for the payment of money lent, it was held that the action might have been supported for money lent, upon proof of the actual consideration which created a debt, even though there was an express promise to pay the debt.[156]

152. 2 Smith's Leading Cases, 1 notes to Cutter v. Powell (13th ed. by Chitty, Denning & Harvey, London 1929).

153. 75 Vt. 441, 56 Atl. 95 (1903).

154. Hersey v. Northern Assurance Co., 75 Vt. 44, 56 Atl. 95 (1903).

155. 3 Pet. (U.S.) 1, 7 L. Ed. 581 (1830). See also Pownall v. Ferrand, 6 B. & C. 439, 108 Eng. Rep. 513 (1827); Davis v. Smith, 79 Me. 351, 10 Atl. 55 (1887); Gebbs v. Bryant, 1 Pick. (Mass.) 439 (1823).

156. If, by the terms of the special contract which the plaintiff has performed, he is to be paid, not in money, but in specific articles, the action must be in special assumpsit. Thus, the common counts will not lie where the price is payable partly in cash and partly by the conveyance of land.

Illinois: Kinne v. Lane, 230 Ill. 544, 82 N.E. 878, 120 Am. St. Rep. 338 (1917); Meyers v. Schemp, 67 Ill. 469 (1873); *Kentucky*: Cochran v. Tatum, 3 T.B. Mon. (Ky.) 405 (1826); *Maine*: Thomas Mfg. Co. v. Watson, 85 Me. 300, 27 Atl. 176 (1893); *Massachusetts*: Shearer v. Jewett, 14 Pick. (Mass.) 232 (1833); Bayliss v. Fettyplace, 7 Mass. 329 (1811); Emerton v. Andrews, 4 Mass. 653 (1808); *Michigan*: Pierson v. Spaulding, 61 Mich. 90, 27 N.W. 865 (1886); *New Hampshire*: Raulett v.

(II) *Where the Express Contract Has Been Fully Executed or Performed.* — If the contract has been fully executed by the plaintiff and nothing remains to be done but the payment of the price in money by the defendant, the plaintiff may either declare in Special Assumpsit on the contract, or he may declare in General Assumpsit, at his election, or he may join the common counts with special counts.[157] Where the declaration is in General Assumpsit, it is not based on the special contract, but on the defendant's legal liability to pay for the benefits received; but the contract is evidence of the value of the benefits, and his recovery will be limited to the compensation therein fixed.

(III) *Where the Express Contract Has Not Been Substantially Executed or Performed.* — Where an express contract has been substantially executed, but in a manner materially variant from the stipulations of the contract, the plaintiff cannot recover on the contract in Special Assumpsit, as he cannot prove compliance with

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Moore, 21 N.H. 336 (1850); *New York*: Wilt v. Ogden, 13 Johns. (N.Y.) 56 (1816); *Pennsylvania*: Doebler v. Fisher, 14 Serg. & R. (Pa.) 179 (1820); *Virginia*: Brook v. Scott's Ex'rs, 2 Munf. (Va.) 344 (1811); *English*: Harrison v. Luke, 14 M. & W. 139, 153 Eng. Rep. 423 (1845).

Indebitatus Assumpsit is not the proper form of action where the agreement sought to be enforced is not for the payment of money for machinery, but for the liquidation of the debt by the obtaining of notes from a third party for whom the defendant is acting. Power Equipment Co. v. Gale Installation Co., 210 Ill. App. 147 (1918).

157. *Federal*: Dermott v. Jones, 2 Wall. (U.S.) 1, 17 L. Ed. 762 (1865); Chesapeake & O. Canal Co. v. Knapp, 9 Pet. (U.S.) 566, 9 L. Ed. 222 (1835); Perkins v. Hart, 11 Wheat. (U.S.) 237, 6 L. Ed. 463 (1826); Bank of Columbia v. Patterson, 7 Cranch (U.S.) 299, 3 L. Ed. 351 (1813); *Alabama*: Trammell v. Lee County, 94 Ala. 194, 10 So. 213 (1891); *Illinois*: McArthur Bros. Co. v. Whitney, 202 Ill. 527, 67 N.E. 163 (1903); Combs v. Steele, 80 Ill. 101 (1875); Tunnison v. Field, 21 Ill. 108 (1859); Lane v. Adams, 19 Ill. 167 (1857); Throop v. Sherwood, 4 Gil. (Ill.) 92 (1847); *Maryland*: Ridgeley v. Crandall, 4 Md. 441 (1853); *Massachusetts*: Knight v. New England Worsted Co., 2 Cush. (Mass.) 271 (1848); Baker v. Cory, 19 Pick. (Mass.) 496 (1837); Felton v. Dickenson, 10 Mass. 287 (1813); Everett v. Gray, 1 Mass. 101 (1804); *Michigan*: Nugent v. Teachout 67, Mich. 571, 35 N.W. 254 (1887); *New York*: Peltier v. Sewall, 12 Wend. (N.Y.) 386 (1834); Williams v. Sherman, 7 Wend. (N.Y.) 109 (1831); Dubois v. Delaware & H. Canal Co., 4 Wend. (N.Y.) 285 (1830); Jewell v. Schroeppel, 4 Cow. (N.Y.) 564 (1825); *Pennsylvania*: Bomeisler v. Dobson, 5 Whart. (Pa.) 398 (1839); Miles v. Moodie, 3 Serg. & R. (Pa.) 211 (1817); Kelly v. Foster, 2 Bin. (Pa.) 4 (1809); *Virginia*: Baltimore & O. R. Co. v. Polly, 14 Gratt. (Va.) 477 (1858).

The action cannot be brought before the expiration of a term of credit given by the special contract, for until then the defendant has not broken his contract, and no right of action at all has accrued. *Illinois*: Manton v. Gammon, 7 Ill. App. 201 (1880); *Massachusetts*: Hannemann v. Inhabitants of Grafton, 10 Metc. (Mass.) 454 (1845); Loring v. Gurney, 5 Pick. (Mass.) 16 (1827); *Pennsylvania*: Girard v. Taggart, 5 Serg. & R. (Pa.) 19, 9 Am. Dec. 327 (1818); *English*: Robson v. Godfrey, 1 Stark. 275, 171 Eng. Rep. 225 (1816).

The common counts lie in case of a contract for the sale of goods only where the contract has been performed by the seller, and nothing remains to be done but to make the payment. *Alabama*: Montgomery Co. v. New Farley Nat. Bank, 200 Ala. 170, 75 So. 918 (1917); *Illinois*: Brand v. Henderson, 107 Ill. 141 (1883).

Where an attorney rendered services under a contract providing for a contingent fee, and the contract was wholly executed, he may recover his fee in assumpsit on the common counts. Carpenter v. Smithey, 118 Va. 533, 88 S.E. 321 (1916).

Common counts may be joined with a special count, alleging an express written contract. Alexander v. Capital Paint Co., 136 Md. 658, 111 Atl. 140 (1920); Conservation Co. v. Stimpson, 136 Md. 314, 110 Atl. 495 (1920).

the terms of the contract. If, however, the defendant has accepted the work as done and has received a benefit from the irregular performance of the agreement, he will in most instances be required to pay the actual value of the work inuring to his benefit. Whether in such a situation, that is, where one has defectively or incompletely, yet substantially performed a contract, he may recover despite his shortcoming, involves a question of the substantive law of contract, determined, as Professor Keigwin aptly observes "by considerations which occasion much conflict and confusion in the authorities and with which we are here not concerned".[158] If we assume that the insufficient performance gives a right to recover, the action would be upon the common counts.[159]

(IV) *Where There Is an Express Contract and the Plaintiff has Not Substantially Performed.* — Where the plaintiff has, without his wilful default, failed to perform the special contract, in some material respect, within the time or in the manner therein stipulated, he cannot maintain Special Assumpsit on the contract, as he cannot show substantial performance on his part.[160] If he can recover at all, it must be in General Assumpsit, on a promise by the defendant implied in law because of the benefits received by him. As to whether he can recover at all, even in General Assumpsit, the authorities are not in agreement. The question is whether the law will refuse a party in default any relief or will imply a promise by the defendant to pay for the benefits received by him. If it will, General Assumpsit will lie; if it will not, there can be no recovery at all. The question must be answered by the substantive law of contract or quasi-contract.[161]

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158. Keigwin, Cases in Common Law Pleading, Bk. III, *The Statutory Actions*, § 77, 218 (2d ed. Rochester 1934).

159. For an authoritative statement of the law concerning contracts substantially performed and the remedies therefor, see Dermott v. Jones, 2 Wall. (U.S.) 1, 17 L. Ed. 762 (1864).

160. Hayward v. Leonard, 7 Pick. (Mass.) 181, 19 Am. Dec. 268 (1828).

161. See Clark, Contracts, c. 12, *Recovery for Benefits Conferred*, § 273, 647 (3d ed. by Throckmorton, St. Paul 1914).

For cases in which recovery in General Assumpsit has been allowed, see: *Federal*: Dermott v. Jones, 23 How. (U.S.) 220, 16 L. Ed. 442 (1859); *Connecticut*: Pinches v. Swedish Evangelical Lutheran Church, 55 Conn. 183, 10 Atl. 264 (1887); Blakeslee v. Holt, 42 Conn. 226 (1875); *Iowa*: Corwin v. Wallace, 17 Iowa 374 (1864); *Maine*: White v. Olive, 36 Me. 92 (1853); Norris v. School Dist., 12 Me. 293, 28 Am. Dec. 182 (1835); *Massachusetts*: Blood v. Wilson, 141 Mass. 25, 6 N.E. 362 (1886); Hayward v. Leonard, 7 Pick. (Mass.) 181, 19 Am. Dec. 268 (1828); *Nebraska*: McMillan v. Malloy, 10 Neb. 228, 4 N.W. 1004, 35 Am. Rep. 471 (1880); *New Hampshire*: Wadleigh v. Town of Sutton, 6 N.H. 15, 23 Am. Dec. 704 (1832); *Tennessee*: Parker v. Steed, 1 Lea. (Tenn.) 206 (1878); *Vermont*: Viles v. Barre & M. Traction & Power Co., 79 Vt. 311, 65 Atl. 104 (1906); Kelly v. Town of Bradford, 33 Vt. 35 (1860); *Wisconsin*: Taylor v. Williams, 6 Wis. 363 (1858); *English*: Lucas v. Godwin, 3 Bing. (N.C.) 737, 132 Eng. Rep. 595 (1837). See also Ballantine, *Forfeiture for Breach of Contract*, 5 Minn. L. Rev. 329 (1921).

For cases in which it is held that there can be no recovery at all, see: Cutter v.

(V) *Where After Part Performance of the Contract, Further Performance is Prevented by an Act of the Defendant, or by Some Act Which in Law Operates as a Discharge of the Contract, or if the Contract is Abandoned or Rescinded.* — If, after the plaintiff has performed part of the special contract according to its terms, he is prevented from performing the residue by some act of the defendant;[162] or if he is so prevented by some act or event, not within the control of either party, which in law operates as a discharge of the contract, and excuses nonperformance by him of the residue[163] or if, after such partial performance, the contract is abandoned by mutual consent, or waived or rescinded[164] — the plaintiff may maintain General Assumpsit to recover for what he has done. Or, in the case of prevention of further performance by the defendant, the plaintiff may, at his election, sue in Special Assumpsit, for such prevention is a breach of the contract by the defendant, and the plaintiff may, instead of claiming a discharge of the contract, consider it as being still in force.[165]

Powell, 6 T. R. 320, 101 Eng. Rep. 573 (1795); to which is attached an exhaustive note, in 2 Smith's Leading Cases, 9 (13th ed. by Chitty, Denning & Harvey, London 1929).

162. *Federal*: Perkins v. Hart, 11 Wheat. (U.S.) 237, 6 L. Ed. 463 (1826); *Illinois*: Kipp v. Massin, 15 Ill. App. 306 (1884); Guerdon v. Corbett, 87 Ill. 272 (1877); Sanger v. Chicago, 65 Ill. 506 (1872); Catholic Bishop of Chicago v. Bauer, 62 Ill. 188 (1871); Selby v. Hutchinson, 4 Gil. (Ill.) 319 (1847); Bannister v. Read, 1 Gil. (Ill.) 99 (1844); *Indiana*: Hoagland v. Moore, 2 Blackf. (Ind.) 167 (1828); *Maine*: Wright v. Haskell, 45 Me. 489 (1858); *Massachusetts*: Johnson v. Trinity Church Soc., 11 Allen (Mass.) 123 (1865); Moulton v. Trask, 9 Metc. (Mass.) 577 (1845); *Michigan*: Mooney v. New York Iron Works Co., 82 Mich. 263, 46 N.W. 376 (1890); *New York*: Jones v. Judd, 4 N.Y. 412 (1850); Dubois v. Delaware & H. Canal Co., 4 Wend. (N.Y.) 285 (1830); *Pennsylvania*: Hall v. Rupley, 10 Pa. 231 (1849); Algeo v. Algeo, 10 Serg. & R. (Pa.) 235 (1823); *Rhode Island*: Green v. Haley, 5 R.I. 263 (1858); *Vermont*: Derby v. Johnson, 21 Vt. 17 (1848).

163. *Connecticut*: Leonard v. Dyer, 26 Conn. 172, 68 Am. Dec. 382 (1857); *Maine*: Lakeman v. Pollard, 43 Me. 464 (1857); *Massachusetts*: Fuller v. Brown, 11 Metc. (Mass.) 440 (1846); Williston v. Inhabitants of West Boyeston, 4 Pick. (Mass.) 101 (1826); *New York*: Wolfe v. Howes, 20 N.Y. 197, 75 Am. Dec. 388 (1859); *Rhode Island*: Parker v. McComber, 17 R.I. 674, 24 Atl. 464, 16 L.R.A. 858 (1892); Yerrington v. Greene, 7 R.I. 589, 84 Am. Dec. 578 (1863); *Vermont*: Fenton v. Clark, 11 Vt. 557 (1839); *Wisconsin*: Jennings v. Lyons, 39 Wis. 553, 20 Am. Rep. 57 (1876); Greene v. Gilbert, 21 Wis. 395 (1867).

164. *Federal*: Perkins v. Hart, 11 Wheat. (U.S.) 237, 6 L. Ed. 463 (1826); *Illinois*: Catholic Bishop of Chicago v. Bauer, 62 Ill. 188 (1871); Bannister v. Read, 1 Gil. (Ill.) 99 (1844); *Indiana*: Adams v. Crosby, 48 Ind. 153 (1874); *Massachusetts*: Monroe v. Perkins, 9 Pick. (Mass.) 298, 20 Am. Dec. 475 (1830); Hill v. Green, 4 Pick. (Mass.) 114 (1826); Goodrich v. Laughlin, 1 Pick. (Mass.) 57 (1822); *Michigan*: Wildey v. Fractional School Dist. No. 1 of Paw Paw and Antwerp, 25 Mich. 419 (1872); Allen v. McKibbon, 5 Mich. 449 (1858); *New Hampshire*: Jenkins v. Thompson, 20 N.H. 457 (1846); *New York*: Dubois v. Delaware & H. Canal Co., 4 Wend. (N.Y.) 285 (1830); Lenningdale v. Livingson, 10 Johns. (N.Y.) 36 (1813).

165. *Alabama*: Davis v. Ayres, 9 Ala. 292 (1846); *Kentucky*: Rankin v. Darnell, 11 B. Mon. (Ky.) 31, 52 Am. Dec. 557 (1850); Jewell v. Blandford, 7 Dana (Ky.) 473 (1838); *New York*: Judd v. Judd, 4 N.Y. 412 (1850); *Pennsylvania*: Stewart v. Walker, 14 Pa. 293 (1850); Pedan v. Hopkins, 13 Serg. & R. (Pa.) 45 (1825); *Vermont*: Derby v. Johnson, 21 Vt. 17 (1848). See also *Illinois*: Levy & Hepple Motor Co. v. City Motor Cab Co., 174 Ill. App. 20 (1912); *Massachusetts*: St. John v. St. John, 223 Mass. 137, 111 N.E. 719 (1916); *Wisconsin*: Loehr v. Dickson, 141 Wis. 332, 124 N.W. 293, 30 L.R.A. (n.s.) 495 (1910).

It is held in Illinois that a recovery of the balance due on a building contract be had

(VI) *Where the Contract is Merely Void (Not Illegal), or Merely Unenforceable, or Voidable, and Has Been Voided, There May Be a Recovery in General Assumpsit for Part Performance.*—If the special contract, which the plaintiff has partially performed, is void (not illegal) or unenforceable, or voidable, and has been avoided by the plaintiff or defendant, General Assumpsit may be maintained for the partial performance. This rule, as is shown in the note below, is subject to some qualifications.[166]

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under common counts, where the contractor relies on matter of excuse for not procuring the final certificate of approval by the architect; but in case of substantial performance, where no certificate is called for, recovery may be had under the common counts for labor and material in spite of slight variations. Why the plaintiff cannot show excuse for non-production of an architect's certificate under the common counts to show a recoverable indebtedness for value received is not entirely clear. *Compare* Peterson v. Pusey, 237 Ill. 204, 86 N.E. 692 (1916). See also Concord Apartment House Co. v. O'Brien, 228 Ill. 360, 369, 81 N.E. 1038 (1907); Parmly v. Farrar, 169 Ill. 606, 48 N.E. 693 (1897); City of Elgin v. Joslyn, 136 Ill. 525, 26 N.E. 1090 (1891); Catholic Bishop of Chicago v. Bauer, 62 Ill. 188 (1871).

It is otherwise in case full performance has been prevented by act of the defendant. Catholic Bishop of Chicago v. Bauer, 62 Ill. 188 (1871); Mooney v. York Iron Co., 82 Mich. 263, 46 N.W. 376 (1890). And on substantial performance, see Evans v. Howell, 211 Ill. 85, 71 N.E. 854 (1904).

166. Thurston v. Percival, 1 Pick. (Mass.) 415 (1823).

Thus where an infant performs services under a contract, which he has a right to avoid because of his infancy, and he avoids the contract before he has fully performed, he may bring General Assumpsit for the services rendered. *Illinois*: Ray v. Haynes, 52 Ill. 485 (1869); *Massachusetts*: Caffney v. Hayden, 110 Mass. 137, 14 Am. Rep. 580 (1872); Moses v. Stevens, 2 Pick. (Mass.) 332 (1824); *New York*: Medbury v. Watrous, 7 Hill (N.Y.) 110 (1845); *Vermont*: Price v. Furman, 27 Vt. 268, 65 Am. Dec. 194 (1855).

And generally, where a person who has partly performed a contract rescinds it on the ground of fraud, undue influence, duress, or for want or failure of consideration, or want of capacity to contract, or because of a breach of the contract by the other party operating as a discharge, he may recover in General Assumpsit for his part performance. Clark, Handbook of the Law of Contract, c. 12, *Quasi-Contracts*, 650 (3d ed. by Throckmorton, St. Paul 1914). See also the following cases: *Illinois*: Citizens Gaslight & Heating Co. v. Granger, 118 Ill. 206, 8 N.E. 770 (1886); T. W. & W. R. Co. v. Chew, 67 Ill. 378 (1873); *Kansas*: Shane v. Smith, 37 Kan. 55, 14 Pac. 477 (1877); *Massachusettss* Caffney v. Hayden, 110 Mass. 137, 14 Am. Rep. 580 (1872); Welhaus v. Bemis, 108 Mass. 91, 11 Am. Rep. 318 (1871); *Michigan*: Aldine Mfg. Co. v. Barnard, 84 Mich. 632, 48 N.W. 280 (1891); *Minnesota*: Brown v. St. Paul, M. & M. Ry. Co., 36 Minn. 236, 31 N.W. 941 (1886); *Mississippi*: Evans v. Miller, 58 Miss. 120, 38 Am. Rep. 313 (1880); *New York*: Goodwin v. Griffis, 88 N.Y. 631 (1882); Midbury v. Watrous, 7 Hill (N.Y.) 110 (1845); Wilson v. Forec, 6 Johns. (N.Y.) 110, 5 Am. Dec. 195 (1810); *Pennsylvania*: Seipel v. International Life Ins. & Trust Co., 84 Pa. 47 (1877); *Wisconsin*: Walker v. Duncan, 68 Wis. 624, 32 N.W. 689 (1887); *English*: *Ex parte* McClure, L.R. 5 Ch. App. 737 (1870); Russell v. Bell, 10 M. & W. 340, 152 Eng. Rep. 500 (1842); Planche v. Colburn, 8 Bing. 14, 131 Eng. Rep. 305 (1831). As to the qualifications of this rule, see Clark, Handbook on the Law of Contracts, c. 12, *Quasi-Contracts*, 650 (3d ed. by Throckmorton, St. Paul 1914).

If the special contract is void because it is illegal, in that it is contrary to public policy, or in violation of the common law, or of a statute, neither of the parties, if in *pari delicto*, can recover from the other for a partial perfomance. Clark, *op. cit. supra*.

When an agreement is not illegal, but merely void, or unenforceable, as where it fails to comply with the Statute of Frauds, or is made *ultra vires* by a corporation, or for any other reason, and one of the parties refuses to perform his part after performance or part performance by the other, the law will create a promise to pay for the benefits received. *Alabama*: Smith v. Wooding, 20 Ala. 324 (1852); *Arkansas*: Walker v. Shackelford, 49 Ark. 503, 5 S.W. 887, 4 Am. St. Rep. 61 (1887); *California*: Rebman v. San Gabriel Valley Land & Water Co., 95 Cal. 390, 30 Pac. 564 (1894); Patten v. Hicks, 43 Cal. 509 (1872); *Illinois*: McGinnis v. Fernandes, 126 Ill. 228, 19 N.E. 44 (1888); *Indiana*: Miller v. Eldridge, 126 Ind. 461, 27 N.E. 132 (1891); Schoonover v. Vachon, 121 Ind. 3, 22 N.E. 777 (1889); *Kansas*: Wonsetter v. Lee, 40 Kan. 367, 19 Pac. 862 (1888); *Kentucky*: Montague v. Garnett, 3 Bush. (Ky.) 297 (1867); *Maryland*: Baker v. Lauterbach, 68 Md. 64, 11 Atl. 704 (1887); *Massachusetts*: Van

(VII) *Where Additional Work Has Been Done on Request in Performing a Special Contract.* — If the special contract has been fully performed by the plaintiff, and something additional has also been done by him under circumstances entitling him to compensation therefor, the declaration may be special, as far as the express contract goes, and general as to the extras.[167]

PART IV

INDEBITATUS ASSUMPSIT DISTINGUISHED FROM AND CONCURRENT WITH OTHER ACTIONS

IT is essential that the distinctions between Indebitatus Assumpsit and other actions should be clearly understood. It is frequently said that Indebitatus Assumpsit is a substitute for Debt on Simple (Executed) Contract. For all practical purposes this is true, but in order to be technically correct, the statement requires some qualification, as strictly speaking, Indebitatus Assumpsit differed from Debt in that it might be maintained in situations where the debt alleged was not susceptible of precise proof,[168] as required in Debt; it could be used to recover installments of a debt which in its entirety was not yet due;[169] and it lay against an executor or administrator, against whom Debt would not lie under the early common law, because of the defendant's right to demand trial by Wager of Law.[170] Moreover, this statement may only be true of Indebitatus Assumpsit as it stood at the end of its second stage of development; for until Debt was extended to cover obligations which were not certain, but which might be reduced to certainty by averment or proof, Debt was not a remedy for obligations similar to but not identical with a true common-law debt, and now known as quasi-contractual obligations. And while Indebitatus Assumpsit would usually lie where Debt would lie, the converse was not true. As Dean Ames has pointed out, there were many cases where Assumpsit was the only remedy, as the benefit received did not constitute a real debt or a real contract.[171]

Deusen v. Blum, 18 Pick. (Mass.) 229, 29 Am. Dec. 582 (1836); *Michigan*: Cadman v. Markle, 76 Mich. 448, 43 N.W. 315, 5 L.R.A. 707 (1889); Nugent v. Teachout, 67 Mich. 571, 35 N.W. 254 (1887); Whipple v. Parker, 29 Mich. 369 (1874); *Nevada*: Lapham v. Osborne, 20 Nev. 168, 18 Pac. 881 (1881); *New York*: Little v. Martin, 3 Wend. (N.Y.) 219, 20 Am. Dec. 688 (1829); *Texas*: Steven's Ex'rs v. Lee, 70 Tex. 279, 8 S.W. 40 (1888); *Wisconsin*: Ellis v. Cary, 74 Wis. 176, 42 N.W. 252, 4 L.R.A. 55, 17 Am. St. Rep. 125 (1882).

167. Dubois v. Delaware & H. Canal Co., 4 Wend. (N.Y.) 285 (1830); *Id.*, 12 Wend. (N.Y.) 334 (1834); McCormick v. Connoly, 2 Bay (S.C.) 401 (1802).

168. Vaux v. Mainwaring, Fort. 197, 92 Eng. Rep. 816 (1714).

169. Rudder v. Price, 1 Bl. H. 547, 126 Eng. Rep. 314 (1791).

170. On the present validity of this distinction see Childers v. Emery, 8 Wheat. (U.S.) 642, 5 L. Ed. 765 (1823).

171. Ames, *Parol Contracts Prior to Assumpsit*, 8 Harv. L. Rev. 252 (1894).

In a certain sense, however, Debt was broader than Indebitatus Assumpsit, as the latter action would not lie on a specialty, a record, or a statute, generally, it was a substitute for Debt originally only in the field of Debt on Simple (Executed) Contract; and in the sense that originally Debt was not available on quasi-contractual obligations, whereas Indebitatus Assumpsit would lie, the latter action might be said to be broader than the former.

Special Assumpsit was an action to recover damages for the breach of an express contract, whereas Indebitatus Assumpsit was an action to recover a common-law debt, and finally, to recover obligations akin to debts, but not quite identical therewith.

But as we have seen, Indebitatus Assumpsit and Debt were concurrent in the field of Debt on Simple (Executed) Contract, and Indebitatus Assumpsit may and frequently is concurrent with Special Assumpsit, where, over and above the simple, executed contract, which supports the former action, there is also an express promise, which has been breached. And in such a case it may be eminently judicious to so frame the declaration in Assumpsit as to permit the plaintiff to avail himself of either contract. This result may be attained by declaring in a special count upon the actual or express contract and thereafter adding one or more common counts, covering the meritorious services the rendition of which may be proved.

Moreover, in a broad sense, Indebitatus Assumpsit is a concurrent remedy with Trover. Thus, where a defendant has taken and converted the chattels of the plaintiff, at his election, the plaintiff may sue in Trover for the conversion, or he may waive the tort, and sue in Indebitatus Assumpsit on a count for money had and received, or upon the imputed promise or payment to be deduced from the defendant's moral obligation to pay for what he has wrongfully acquired.

PART V[172]

FORMS OF ORIGINAL WRIT AND DECLARATIONS IN INDEBITATUS (GENERAL) ASSUMPSIT

ORIGINAL WRIT

GEORGE THE THIRD, &c.

To the Sheriff of .....County.

GREETINGS:

Command C. D., late of ....., that justly and

172. For the older forms of the writ on promises, see Fitz-Herbert, *Natura Brevium*, 213 (Dublin 1793).

without delay he render to A. B. the sum of ..... of good and lawful money of Great Britain, which he owes to, and unjustly detains from him, as it is said: and unless he shall so do, and if the said A. B. shall make you secure of prosecuting his claim, then summon by good summoners, the said C. D. that he be before us, on ..... wheresoever we shall be in England, (or, in C. P. before our justices at Westminister, on .....), to shew wherefore he hath not done it, and have there the names of the summoners, and this writ . Witness ourself, &c.

TIDD'S Appendix, 20 (8th ed. London, 1819).

COMMON COUNT[173] FOR MONEY PAID

GEORGE THE FIRST, by the grace of God, of the United Kingdom of Great Britain and Ireland, King, Defender of the Faith.

To the Sheriff of .....County.

GREETINGS:

AND whereas, also, the said C. D. afterwards, to wit, on the day and year aforesaid, at ....., aforesaid, in the county aforesaid, was indebted to the said A. B. in the farther sum of ..... dollars, for so much money by the said A. B. before that time paid, laid out, and expended to and for the use of the said C. D., at his like instance and request; and being so indebted, he, the said C. D., in consideration thereof, afterwards, to wit, on the day and year aforesaid, at ....., aforesaid, in the county aforesaid, undertook and faithfully promised the said A. B. to pay him the said last-mentioned sum of money when he, the said C. D., should be thereto afterwards requested.

SHIPMAN, Handbook of Common-Law Pleading, c. XI, 261 (3d ed. by Ballantine, St. Paul, 1923).

COMMON COUNT FOR MONEY HAD AND RECEIVED

GEORGE THE FIRST, by the grace of God, of the United Kingdom of Great Britain and Ireland, King, Defender of the Faith.

To the Sheriff of .....County.

GREETINGS:

AND whereas, also, the said C. D. afterwards, to wit, on the

173. For the distinctions between the various common counts, 3 Street, Foundations of Legal Liability, c. XV, *The Action of Indebitatus Assumpsit*, 185-199 (Northport 1906).

day and year aforesaid, at ....., aforesaid, in the county aforesaid, was indebted to the said A. B. in the farther sum of ..... dollars, for so much money by the said C. D. before that time had and received to and for the use of the said A. B.; and, being so indebted, he, the said C. D. in consideration thereof, afterwards, to wit, on the day and year aforesaid, at ....., aforesaid, in the county aforesaid, undertook and faithfully promised the said A. B. to pay him the said last mentioned sum of money when he, the said C. D., should be thereto afterwards requested.

SHIPMAN, Handbook of Common-Law, c. XI, 261
(3d ed. by Ballantine, St. Paul 1923).

COMMON COUNT FOR MONEY LENT

GEORGE THE FIRST, by the grace of God, of the United Kingdom of Great Britain and Ireland, King, Defender of the Faith.

To the Sheriff of .....County.

GREETINGS:

AND whereas, also the said C. D. afterwards, to wit, on the day and year aforesaid, at ....., aforesaid, in the county aforesaid, was indebted to the said A. B. in the farther sum of ..... dollars, for so much money by the said A. B. before that time lent and advanced to the said C. D., at his like instance and request; and being so indebted, he, the said C. D., in consideration thereof, afterwards, to wit, on the day and year aforesaid, at ....., aforesaid, in the county aforesaid, undertook and faithfully promised the said A. B. to pay him the said last-mentioned sum of money when he, the said C. D., should be thereto afterwards requested.

SHIPMAN, Handbook of Common-Law, c. XI, 261
(3d ed. by Ballantine, St. Paul 1923).

COMMON COUNT FOR GOODS SOLD AND DELIVERED[174]

GEORGE THE FIRST, by the grace of God, of the United

174. Atwood v. Lucas, 53 Me. 508, 89 Am. Dec. 713 (1806).

In an action for goods sold and delivered where recovery is based on the common counts, the evidence must show a delivery of the goods alleged to have been sold. Reeb v. Bronson, 196 Ill. App. 518 (1915).

A count for goods bargained and sold will lie where title has passed to the defendant without delivery. Seckel v. Scott, 66 Ill. 106 (1872); Acme Food Co. v. Older, 64 W. Va. 255, 61 S.E. 235, 17 L.R.A. (n.s.) 807 (1908). See also 1 Chitty, Treatise on Pleading and Parties to Actions with Precedents and Forms, c. IV, *Of the Praecipe and Declaration*, 345, 347 (16th Am. ed. by Perkins, Springfield 1876).

Kingdom of Great Britain and Ireland, King, Defender of the Faith.

To the Sheriff of .....County.

GREETINGS:

FOR that, whereas, the said C. D. heretofore, to wit, on the ..... day of ....., A. D. 17....., at ....., in the county of ....., was indebted to the said A. D. in the sum of ..... dollars, for divers goods, wares and merchandises by the said A. B. before that time sold and delivered to the said C. D. at his special instance and request; and being so indebted, he, the said C. D., in consideration thereof, afterwards, to wit, on the day and year aforesaid, at ....., aforesaid, in the county aforesaid, undertook and faithfully promised the said A. B. to pay him the sum of money when he, the said C. D., should be thereto afterwards requested.

SHIPMAN, Handbook of Common-Law Pleading, c. XI, 260 (3d ed. by Ballantine, St. Paul, 1923).

QUANTUM VALEBANT COUNT IN ASSUMPSIT

GEORGE THE FIRST, by the grace of God, of the United Kingdom of Great Britain and Ireland, King, Defender of the Faith.

To the Sheriff of .....County.

GREETINGS:

AND whereas, also, on the day last above mentioned, at the county aforesaid, in consideration that the plaintiff, at the request of the defendant, had before that time sold and delivered (or bargained and sold, as the case may be) to the defendant, divers other goods, chattels, and effects, the defendant promised the plaintiff to pay him, when requested, so much money as the last-mentioned goods, chattels, and effects, at the time of the sale and delivery (or bargain and sale, as the case may be) thereof were reasonably worth, and the plaintiff avers that the same were then and there reasonably worth the sum of ..... dollars, whereof the defendant, on the day last aforesaid, there had notice.

(Form of common breach to be used with the above declaration)

SHIPMAN, Handbook of Common-Law Pleading, c. XI, 263 (3d ed. by Ballantine, St. Paul 1923).

COMMON COUNT FOR WORK AND LABOR

GEORGE THE FIRST, by the grace of God, of the United Kingdom of Great Britain and Ireland, King, Defender of the Faith.

To the Sheriff of .....County.

GREETINGS:

AND whereas, also, the said C. D. afterwards, to wit, on the day and year aforesaid, at ....., aforesaid, in the county aforesaid, was indebted to the said A. B. in the farther sum of ..... dollars, for work and labor, care and diligence by the said A. B. before that time done, performed and bestowed in and about the business of the said C. D., and for the said C. D., at his like instance and request; and being so indebted, he, the said C. D., in consideration thereof, afterwards, to wit, on the day and year aforesaid, at ....., aforesaid, in the county aforesaid, undertook and faithfully promised the said A. B. to pay him the said last-mentioned sum of money when he, the said C. D. should be thereto afterwards requested.

SHIPMAN, Handbook of Common-Law Pleading, c. XI, 261 (3d ed. by Ballantine, St. Paul 1923).

QUANTUM MERUIT ASSUMPSIT COUNT

GEORGE THE FIRST, by the grace of God, of the United Kingdom of Great Britain and Ireland, King, Defender of the Faith.

To the Sheriff of .....County.

GREETINGS:

FOR that, whereas, the defendant heretofore, to wit, on the ..... day of ....., in the year ..... at the county aforesaid, in consideration that the plaintiff, at the request of the defendant, had done certain labor and services for him, etc. (stating the subject-matter according to the fact, and conclude as follows):

The defendant promised the plaintiff to pay him, on request, so much money as he therefor reasonably deserved to have, and the plaintiff avers that he then and there reasonably deserved to have therefor the sum of ..... dollars, whereof the defendant then and there had notice.

SHIPMAN, Handbook of Common-Law Pleading, c. XI, 262 (3d ed. by Ballantine, St. Paul 1923).

FORM OF COUNT FOR ACCOUNT STATED

GEORGE THE FIRST, by the grace of God, of the United Kingdom of Great Britain and Ireland, King, Defender of the Faith.

To the Sheriff of .....County.

GREETINGS:

AND whereas, also, the said C. D. afterwards, to wit, on the day and year aforesaid, at ....., aforesaid, in the county aforesaid, accounted with the said A. B. of and concerning divers other sums of money from the said C. D. to the said A. B. before that time due and owing and then in arrear and unpaid; and upon that account the said C. D. was then and there found to be in arrear and indebted to the said A. B. in the farther sum of ..... dollars; and being so found in arrear and indebted, he, the said C. D., in consideration thereof, afterwards, to wit, on the day and year aforesaid, at ..... aforesaid, in the county aforesaid, undertook and faithfully promised the said A.B. to pay him the said last-mentioned sum of money when he, the said C. D., should be thereto afterwards requested.

SHIPMAN, Handbook of Common-Law Pleading, c. XI, 262 (3d ed. by Ballantine, St. Paul 1923).

COMMON BREACH

GEORGE THE FIRST, by the grace of God, of the United Kingdom of Great Britain and Ireland, King, Defender of the Faith.

To the Sheriff of .....County.

GREETINGS:

YET the said C. D., not regarding his said several promises and undertakings, but contriving and fraudulently intending, craftily and subtilly, to deceive and defraud the said A. D. in this behalf, hath not yet paid the said several sums of money, or any part thereof, to the said A. B., although oftentimes afterwards requested; but the said C. D. to pay the same, or any part thereof, hath hitherto wholly refused, and still refuses, to the damage of the said A. B. of ..... dollars; and therefore he brings his suit, etc.

.....,
Attorney for Plaintiff.

SHIPMAN, Handbook of Common-Law Pleading, c. XI, 262 (3d ed. by Ballantine, St. Paul 1923).

TO BE CONTINUED

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